IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR OSCEOLA COUNTY, FLORIDA

JOSE FELIZ QUINTANA NEGRON,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.
_______________________________________/

CASE NO.: 2017-AP-000010
Lower Case Nos.: 2016 TR 009505
2016 TR 009511
2016 TR 009512

Appeal from the County Court,
for Osceola County, Florida,
Hal C. Epperson, Jr., County Judge.

Kenneth J. Thomas, Esq.,
for Appellant.

Daniel F.. Mantzaris, Esq., and
Ruben Laboy, Jr., Esq.,
for Appellee.

Before BARBOUR, TYNAN, TENNIS, JJ.

PER CURIAM.

ORDER OF AFFIRMANCE

Procedural History

In 2016, Appellant Jose Negron was arrested following a traffic stop. He was charged with six violations. On August 17, 2017, the county court held an infraction hearing, where the arresting officer testified. For the defense, Negron's fiancée and fellow motorcyclists also testified. After taking the matter under advisement, the court found Negron guilty of three of the violations: failure to maintain registration, running a red light, and unlawful speed. The judgment was filed on October 13, 2016. On December 6,

2016, Negron filed a "Request for Hearing and Motion to Vacate/Set Aside Sentence." The basis for this motion was purportedly newly discovered evidence consisting of the audio of the arresting officer's transmissions during his pursuit of Negron before the stop. Negron claimed that this audio was only uncovered while the State's Attorney was investigating the criminal charges related to the event where he was ticketed and arrested (those charges were later dropped). The motion to vacate was summarily denied on February 22, 2017. Negron filed a motion for rehearing of the motion to vacate on February 27, 2017. This was likewise denied on April 10, 2017. Negron filed a notice of appeal of the denial of rehearing on May 10, 2017. This appeal follows.

Discussion

Negron claims that the lower court erred in denying his motion to vacate based on newly discovered evidence. The "requirements for the granting of a new trial on the ground of newly discovered evidence are (1) that it must appear that the evidence is such as will probably change the result if the new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue(s); and (5) that it is not merely cumulative or impeaching." *City of Winter Haven, for Use & Benefit of Lastinger v. Tuttle/White Constructors, Inc.*, 370 So. 2d 829, 831 (Fla. 2d DCA 1979), *quoting Dade National Bank of Miami v. Kay*, 131 So.2d 24 (Fla. 3d DCA 1961); *see also* Fla. R. Civ. P 1.540(b) (governing newly discovered evidence in civil proceeding). In this case, these requirements can be distilled to two factors—would the "new evidence" change anything? And could it have been reasonably discovered contemporaneously with Negron's trial?

First, this evidence would only have served to further impeach the arresting officer. According to Negron, the audio shows that the officer never turned on his sirens, never mentioned that Negron was speeding, did not call in for a registration check, and never said that Negron ran a red light, all of which was contrary to his testimony. However, the officer never stated that he radioed in with such information. Instead, he testified based on his recollection and only mentioned that he called for backup once a large group of motorcyclists began to gather around the arrest scene. Further, Negron's defense at the hearing

was centered on misidentification and it is unclear how having this audio evidence would have bolstered that. Thus, this evidence is not material.

Second, Negron has not substantiated how this evidence is "new" in that he could not have discovered it with the exercise of due diligence. The audio was evidently available at the St. Cloud Police Department from where it had been obtained by the State's Attorney in Negron's criminal case. It its Answering Brief here, the State asserts that there was no discovery request pursuant to the underlying infraction proceeding. This "new evidence" likely could have been discovered earlier. *See Avant v. Waites*, 295 So.2d 362, 364–365 (Fla. 1st DCA 1974) ("In order for newly discovered evidence to be a valid basis for relief under Rule 1.540, the rule provides that the newly discovered evidence must be such as by due diligence could not have been discovered in time to move for a new trial or rehearing."). For these reasons, we conclude that the county court did not abuse its discretion in denying Negron's "motion to vacate" on the basis of newly discovered evidence. *See Aguirre-Jarquin v. State* 9 So.3d 593, 603 (Fla. 2009).

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED:**

The county court's order denying a rehearing of Negron's "motion to vacate" is **AFFIRMED**.

DONE AND ORDERED in Chambers, at Kissimmee, Osceola County, Florida, on this _____day of October, 2019.

/S/________________________
ELAINE A. BARBOUR
Presiding Circuit Judge

TYNAN and TENNIS, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to **Kenneth J. Thomas, Esq.**, *counsel for Appellant*, at 1500 S Semoran Blvd., Gotha, FL 34734; and **Daniel F. Mantzaris, Esq.**, and **Ruben LaBoy, Jr., Esq.,** *counsel for Appellee*, at 986 Douglas Ave., 332 North Magnolia Ave., Orlando, FL 32802, on this _____th day xx, 2019.

/S/________________________
Judicial Assistant